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02-443

No.

In The
Supreme Court of the United States

LOUIS FREEH, *et al.*,

Petitioners,

v.

NOTRA TRULOCK, III, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

Larry Klayman*
Paul J. Orfanedes
James F. Peterson
JUDICIAL WATCH, INC.
501 School Street, S.W., Suite 725
Washington, D.C. 20024
(202) 646-5172

Counsel for Petitioner

* Denotes Counsel of Record

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QUESTION PRESENTED

1. Whether the U.S. Court of Appeals for the Fourth Circuit correctly applied well-established precedent regarding a claim of retaliation for the exercise of First Amendment rights and qualified immunity for public officials.

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STATEMENT OF THE CASE

Respondent Notra Trulock, III ("Trulock"), is the former Director of the Office of Intelligence for the Department of Energy ("DOE"). Appendix to Petitioners' Br. ("Pet'r App.") at 48a. Respondent Linda Conrad ("Conrad") was Trulock's former Executive Assistant and currently is the Executive Assistant to Lawrence Sanchez ("Sanchez"), the current Director of Intelligence at DOE. Pet'r App. 50a. Respondents shared a Falls Church, Virginia townhouse and computer located there. *Id.*

When Trulock was Director of the Office of Intelligence for the DOE, he uncovered substantial, credible evidence that Chinese espionage agents had penetrated the U.S. nuclear weapons laboratories, including Los Alamos National Laboratory, and had stolen U.S. nuclear weapons secrets including, but not limited to, the design of the W-88 thermonuclear warhead. Pet'r App. 48a. A U.S. Intelligence Community Damage Assessment, completed in 1999, largely validated Trulock's conclusions. *Id.*

In the interim, however, Trulock gave repeated warnings to The White House, Federal Bureau of Investigation ("FBI"), and Central Intelligence Agency ("CIA") about these substantial breaches of national security, but these warnings were ignored. Pet'r App. 49a. In early 2000, Trulock decided to write a "personal reflections-type" manuscript describing his frustrating experiences as a "whistleblower." *Id.* This manuscript included criticism of the White House, FBI and CIA for their mishandling and cover-up of the Chinese spy threat, as well as the compromise of national security at the nuclear weapons laboratories. *Id.*

Trulock took painstaking care not to include any classified information in the manuscript and, in March 2000, sent the document to DOE for a security review before trying to have the manuscript published. *Id.* DOE, however, declined to review the manuscript. Trulock also submitted to, and passed, a polygraph examination intended to reveal any disclosure of classified information. *Id.*

National Review decided to publish an article by Trulock, excerpted from his manuscript, in its July 31, 2000 edition. *Id.* The article, entitled "Energy Loss," was in circulation by early July 2000, prior to the FBI's retaliatory search and seizure that violated Trulock's First Amendment rights. *Id.* Shortly after this article was in circulation, on July 14, 2000, Conrad was confronted by Director Sanchez, her supervisor, at work. Pet'r App. 50a. Director Sanchez, purporting to act on behalf of the FBI, told her that the FBI wanted to question her about Trulock and that they had a search warrant to search her townhouse that she shared with Trulock. *Id.* In fact, the FBI had no search warrant for Conrad's townhouse.

Director Sanchez, still purporting to act on behalf of the FBI, further told Conrad that if she did not cooperate with the FBI, they would break down her front door to execute the warrant, that the media would be present, and that the police had been alerted to the fact that the search was about to take place. Pet'r App. 50a. In fact, none of this was true. Believing what Director Sanchez had told her was true, Conrad became extremely upset and scared, and began to shake. She broke down in tears and remained extremely upset and in tears all day. *Id.*

Throughout the day, Director Sanchez had several telephone calls with FBI Assistant Director for National

Security Neil Gallagher and FBI Inspector in Charge Steve Dillard, who is the head of the FBI's Chinese espionage investigation task force, to discuss the interrogation of Conrad and search of her and Trulock's home. Pet'r App. 51a. DOE Secretary Richardson even contacted FBI Director Louis Freeh to discuss the interrogation and search. *Id.*

Despite the DOE's obvious complicity in the retaliatory search, DOE had made no criminal referral to the FBI regarding Trulock's manuscript, as DOE Secretary Bill Richardson later admitted to Congressman Dan Burton, Chairman of the House of Representatives Government Reform Committee. *Id.* At approximately 4:00 p.m. on July 14, 2000, FBI Agents Brian Halpin ("Halpin") and Steve Carr ("Carr"), acting under the direction, instruction and orders of FBI Director Louis Freeh, FBI Assistant Director Gallagher and FBI Inspector in Charge Dillard, arrived at DOE headquarters, led Conrad to a conference room, closed the door and began to interrogate her. *Id.* The interrogation lasted until 7:15 p.m. or 7:30 p.m. Pet'r App. 53a. During the interrogation, Conrad was not allowed to make any out-going telephone calls. *Id.* Although she was permitted to receive two telephone calls, the two FBI agents did not allow Conrad to take these calls in private but, instead, the agents listened in on Conrad's side of the conversation. *Id.*

Throughout the interrogation, Conrad was visibly upset and fearful. Pet'r App. 50a. While Conrad was visibly upset, Agents Halpin and Carr presented her with a piece of paper to sign. *Id.* at 52a. Halpin and Carr never advised Conrad of her constitutional rights or that she did not have to consent to the interrogation or the subsequent search. *Id.* Believing that the FBI had a search warrant, as Director Sanchez had falsely told her, and that the FBI would break down the door to her home

in the presence of the media and police if she did not cooperate, as Director Sanchez also had falsely told her, she signed the piece of paper without reading it and without knowing what was written on it. *Id.*

After Halpin and Carr had finished their interrogation of Conrad, they followed her to her home and immediately followed her into her home. Pet'r App. 54a. Trulock was present when the agents entered the home. *Id.* He asked to see the agents' search warrant. *Id.* The agents stated that they did not have a search warrant and that Conrad had consented to their search of the computer he shared with Conrad and on which he maintained his private files separate and password-protected from Conrad's files. *Id.* Trulock was never advised of his constitutional rights nor did he freely or voluntarily give his consent to the search of his home or his files maintained on the computer he shared with Conrad. Pet'r App. 55a. Conrad and Trulock understood that they would not, and could not, access each other's personal files on the computer's hard drive. *Id.* at 54a.

With the assistance of an FBI computer specialist, Halpin and Carr accessed Trulock's personal password-protected files and seized them by taking the computer's hard drive. *Id.* at 56a. The computer's hard drive – which was just recently returned to Respondents after being held for more than two years – contained personal banking, billing, checking, financial and tax information, and approximately one year's worth of research by Trulock concerning a genetic disorder from which his son suffers. *Id.* at 58a.

CIA Director George Tenet has since admitted to Chairman Dan Burton, in reference to the retaliatory search and seizure here, that "it looked like somebody has been

wronged." *Id.* at 57a. On July 28, 2000, Respondents' attorneys sent a letter to FBI Director Freeh, by facsimile and hand delivery, asserting that the FBI had violated Trulock's and Conrad's civil rights and requesting a conference to try to resolve them and avoid the necessity of a lawsuit. *Id.* at 59a. Despite confirmation of the FBI's receipt of this letter, neither Freeh nor anyone else from his office ever responded to this letter. *Id.* at 60a.

On the same day, July 28, 2000, Director Sanchez told Conrad that if she proceeded with a lawsuit, he would deny telling her the FBI told him it had a warrant to search her home. *Id.* Director Sanchez also told Conrad that he would make his denial to protect the "Bureau," that she would be "branded" forever, and that her career would be ruined. *Id.*

Subsequently, the district court dismissed Trulock's First Amendment retaliation claim, as well as Respondents' Fourth Amendment claims. Order and Memorandum Opinion (September 22, 2000). Pet'r App. 37a-42a. The U.S. Court of Appeals for the Fourth Circuit ("Court of Appeals") reversed the district court as to the First Amendment claim, finding that more than sufficient facts had been alleged for the case to proceed. *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. December 28, 2001). Pet'r App. 37a.-42a. The Court of Appeals subsequently denied Petitioners' motion for rehearing and rehearing *en banc*. 289 F.3d 829; Pet'r App. 1a-3a.

Petitioners sought and received from this Court an extension of time to file a petition for a writ of certiorari, apparently to allow the Solicitor General additional time to assess whether such a petition was warranted. After the Solicitor General declined the opportunity to bring this case,

Petitioners obtained new counsel and filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Court should decline to grant the petition for a writ of certiorari ("Petition") because: (1) the Court of Appeals' decision is fully consistent with the decisions of this Court relating to suits against federal officers in their personal capacity, articulated most recently in *Crawford-El* v. *Britton*; and (2) no significant split exists between the federal Courts of Appeals regarding the elements of a First Amendment retaliation claim. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THIS COURT'S RECENT DECISION IN *CRAWFORD-EL V. BRITTON.*

Petitioners argue that the Court of Appeals disregarded the pleading requirements for actions against federal officials in their personal capacities. According to Petitioners, the Court of Appeals supposedly held that "Respondents need not allege any factual basis" for a First Amendment retaliation claim, that only a "*mere inference*" that a constitutional violation occurred was necessary. Pet'r Br. at 8 (emphasis in original). This is simply not what the Court of Appeals did or held. *See* 275 F.3d at 405.

The Court of Appeals' decision relies exactly on the kind of "specific, non-conclusory factual allegations" recommended by this Court in *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("*Crawford-El*"). The Court of Appeals correctly recounted the following specific facts alleged in the Complaint:

i. Trulock's article was published in early July;
ii. The article was highly critical of the White House, the CIA, the DOE, and the FBI, the agency that executed the search;
iii. The search of Trulock's home occurred on July 14;
iv. No criminal referral was issued by DOE for the FBI to begin an official investigation;[1]
v. Sanchez told Conrad, on behalf of the FBI, that there was a search warrant when none existed; and
vi. Sanchez later told Conrad that, if she initiated a lawsuit, he would deny telling Conrad that the FBI claimed to have a search warrant in order to protect the "Bureau."

Pet'r App. 19a-20a.[2]

Based on these facts (accepted as true and viewed together), the Court of Appeals decided that it "could not conclude beyond all doubt that Trulock can prove no set of facts in support of his claim [of retaliation] that would entitle him to relief." Pet'r App. 20a. The only "inference" drawn by the Court of Appeals – again when assuming all these facts were true – was clearly based on these six specific and non-conclusory allegations in the Complaint. Thus Petitioners are

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[1]Petitioners argue for the first time that a criminal referral may not have been required in this particular circumstance. Pet'r Br. 13 n.6. This is a factual matter that should have been raised at earlier stage.

[2]The Complaint, of course, alleges numerous additional significant facts. In particular, the high-level contacts between DOE and the FBI to discuss the interrogation and the search will establish that the retaliation against Trulock extended to the highest levels of the government.

simply in error when they assert that the Court of Appeals' decision was based on a "mere" inference.

The numerous and detailed facts contained in the Complaint more than adequately allege a causal link between Trulock's publication of his article and the almost immediate retaliation by Petitioners. Petitioners note that this Court's recent decision in *Crawford-El* extensively examined the issue of qualified immunity for public officials. The opinion in *Crawford-El* stands for the proposition that no special pleading rules exist in cases of constitutional claims alleging improper motive. *Crawford-El*, 523 U.S. at 597. Thus, under *Crawford-El*, Respondents' Complaint more than satisfies the traditional pleading requirement that a complaint "give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Consistent with this Court's rulings, the Court of Appeals appropriately reviewed Respondents' Complaint to determine whether it was clear that no relief could be granted under any set of facts consistent with the allegations. *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). The Court of Appeals found that the Complaint stated a claim for retaliation when it appropriately accepted "the material facts alleged in the complaint as true and construe[d] all *reasonable inferences* in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994) (emphasis added). At each step, the Court of Appeals followed the procedure consistent with this Court's decision in *Crawford-El*.

Petitioners also contend that, by "substituting its judgment for that of the district court," the Court of Appeals erred regarding the sufficiency of Respondent's claim. Pet'r Br. at 9. Petitioners cite *Crawford-El* concerning the discretion to be afforded to district courts regarding "management of the

factfinding process" to argue that the Court of Appeals should have deferred to the legal judgment of the district court. Petitioners quote *Crawford-El* completely out of context as *Crawford-El* is only referring to district courts' experience managing discovery, not their expertise evaluating the legal sufficiency of claims. *Crawford-El* nowhere states that appellate courts should defer or subordinate their legal judgment to that of district courts in First Amendment retaliation cases. 523 U.S. at 600-601. In their own brief to the Court of Appeals, Petitioners argued that an appellate court's standard of review for a district court's ruling is "de novo." *See* Brief for Appellees at 10. Thus it is curious, and incorrect, that Petitioners now argue that the Court of Appeals "inappropriately" substituted its judgment for the district courts'.

Petitioners also suggest that the Court of Appeals' decision may indicate confusion over the application of *Crawford-El*, and that a failure by this Court to grant certiorari and clarify *Crawford-El* "will spawn confusion in the lower courts." Pet'r Br. at 14. Petitioners do not cite any examples of other appellate or district court cases in which courts struggle to interpret *Crawford-El* or state that its holdings are confusing. Petitioners do not assert that a split has emerged between various circuits in their interpretation of *Crawford-El*.

To the contrary, courts have understood and widely applied the holding in *Crawford-El*. For example, the Sixth Circuit recently examined and applied *Crawford-El* in a First Amendment retaliation case. *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002). In its opinion, the court emphasized that "specific, nonclusory allegations of fact that plaintiffs may be required to assert to establish improper motive need not

constitute direct evidence of improper motive." *Id.* at 505. In fact, the Sixth Circuit approvingly cited the Court of Appeals decision in this case for the proposition that facts that show "circumstantial evidence of improper intent" are sufficient to survive a motion to dismiss in a retaliation claim. *Id.*

Moreover, if this Court were to accept Petitioner's invitation to re-examine *Crawford-El* and heightened pleading requirements, it would be much more likely to create the confusion that Petitioners fear. Numerous courts have just recently abandoned heightened pleading requirements in reliance on *Crawford-El*. *See McCook v. Springer*, No. 01-2157, 2002 U.S. App. LEXIS 15875 (10th Cir. Aug. 5, 2002) ("We recently held that our heightened pleading requirement does not survive the Supreme Court's opinion *in Crawford-El v. Britton*" (citing *Patel v. Wooten*, 2001 U.S. App. LEXIS 15621, No. 00-1187 (10th Cir. July 12, 2001 overruling *Gehl v. Coby*, 63 F.3d 1528, 1535 (10th Cir. 1995); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.), *cert. denied*, 122 S. Ct. 543 (2001) ("We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*). Even if Petitioners were right that some part of *Crawford-El* needs to be clarified, this Court should wait until such an issue fully materializes. This case is not the appropriate vehicle for any such clarification. Hence, a writ of certiorari in this case is not warranted.

Finally, Petitioners quibble with the Court of Appeals' decision by stating that it did not specifically find that the Complaint alleged that Trulock's article was entitled to First Amendment protection. Pet'r Br. at 12. In fact, the Complaint clearly alleges that Trulock was entitled to First Amendment protection and that his First Amendment rights

were violated by retaliating for the publishing of the article. Pet'r App. 61a, ¶¶ 75-78.

II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY.

Petitioners take issue with the Court of Appeals' analysis of Petitioners' qualified immunity defense, arguing that the court erred in finding sufficient specific and non-conclusory facts included in the Complaint. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (a court must consider: (1) whether the facts alleged show a violation of a constitutional right; and (2) whether it is clear that the conduct was unlawful in the situation).

As described in Section I., *supra*, the Complaint alleges ample specific and non-conclusory facts to establish a violation of a constitutional right. As the Court of Appeals correctly concluded, these facts allege a clear causal link between the publishing of the article and the FBI search.[3]

Petitioners argue that even if the Court of Appeals appropriately moved past the initial inquiry, it erred in determining that Trulock's constitutional right was clearly established. Petitioners assert that the Court of Appeals' finding that Petitioners were entitled to qualified immunity

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[3]Petitioners are perplexed by what they view as a discrepancy between the publication date of the article (July 31, 2000), and the date of the search (July 14, 2000). As alleged in the Complaint, the actual date the magazine became available is just days before the date of the FBI search. As Petitioners are probably aware, many periodicals are dated after the time that they become available in print. Thus, this factual matter has no bearing on the Petition at issue.

with respect to Respondents' Fourth Amendment claim is inconsistent with its finding that the FBI agents were not entitled to qualified immunity with respect to the First Amendment retaliation claim. This argument is without merit. The Court of Appeals' finding that Petitioners were entitled to qualified immunity with respect to the Fourth Amendment claim was premised on the conclusion that "a reasonable officer" in that position would not have known that a search of Trulock's password-protected computer files without his consent would violate clearly established law. 275 F.3d at 399. On the other hand, as to the First Amendment claim, any FBI agent reasonably would have known that a retaliatory search and seizure would violate clearly established law prohibiting such retaliation against an individual for speaking critically of the government. Importantly, this is true regardless of whether the search was legal or illegal, because it has long been clearly established that "[r]etaliation by a public official for the exercise of a constitutional right is actionable . . . even if the act, when taken for different reasons, would have been improper." *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274 (1977). The same factual allegations in the Complaint that create a reasonable inference of a retaliatory motive also are grounds for denying qualified immunity to the Petitioners here, because if the FBI agents had a retaliatory motive in executing the search, then, *ipso facto*, the FBI agents reasonably knew they were violating Trulock's First Amendment rights.

III. NO CONFLICT AMONG THE CIRCUITS JUSTIFIES GRANTING THE WRIT FOR CERTIORARI.

Petitioners claim that the Court of Appeals' decision regarding the elements of a First Amendment retaliation claim are in conflict with other federal Courts of Appeals. This claim does not justify the issuance of a writ for two reasons. First, the subject of the circuit split, the elements of a First Amendment retaliation claim, is not at issue in the present case. Second, the case law Petitioner cites does not indicate that a conflict actually exists.

The key issues before this Court involve the pleading requirements for a First Amendment retaliation claim, as governed by *Crawford-El*, and the application of the doctrine of qualified immunity. At no point have Petitioners argued the Court of Appeals adopted a flawed test to demonstrate a First Amendment retaliation claim. Petitioners also do not assert that the circuit split would have resulted in a different outcome had this case arisen in a different circuit. Moreover, Petitioners point to no evidence of confusion among the courts or unjust outcomes as a result of the alleged split.

Petitioners cite to several cases from different circuits to demonstrate that this alleged conflict exists. A thorough reading of these cases, however, demonstrates that no conflict exists. Most notably, Petitioners misstate and misuse the Fifth Circuit case *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002) – Petitioners' primary evidence of the alleged circuit split. Pet'r Br. at 17-18. Keenan is used as evidence that the Fifth Circuit, along with the First, Second, and Fourth Circuits all share one version of a First Amendment retaliation claim. Petitioners claim that the Sixth, Ninth, and

Tenth Circuits share another version of what elements make up a First Amendment retaliation claim. Petitioners then suggest that by being a member of this former group of circuits, that the Fifth Circuit is "squarely in conflict with the holding of the Sixth, Ninth, and Tenth Circuits." Pet'r Br. 17-18. This is incorrect.

Keenan, in fact, is not squarely in conflict with any of the courts or cases Petitioners claim. In its decision, the Fifth Circuit states that "the settled law of other circuits, which we endorse, holds that to establish a First Amendment retaliation claim...[plaintiffs] must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused then to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff's constitutionally protected conduct." *Keenan*, 290 F.3d at 258. The second element articulated in *Keenan* is the same element articulated in the Sixth Circuit (*Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir. 1998)), the Ninth Circuit (*Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)) and the Tenth Circuit (*Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)). Petitioners' use of *Keenan* as evidence of a significant circuit split is clearly erroneous.

Moreover, a thorough reading of *Keenan* shows that no meaningful conflict exists as to the express language or to the outcome of the cases. As stated above, the Fifth Circuit utilized the "ordinary firmness" element in holding what the plaintiffs had to prove in a First Amendment retaliation claim. The *Keenan* court goes on to state that the second retaliation element "requires some showing that the plaintiffs' exercise of free speech has been curtailed." *Keenan*, 290 F.3d at 259.

By doing this, the Fifth Circuit effectively demonstrated that there is one test for retaliation claims and that test includes both objective and subjective factors. Whether articulated or not, each of the cases cited by Petitioners involve both objective and subjective elements. While the tests used by the courts in *Bloch*, *Mendocino* and *Smith* specifically refer to the "ordinary firmness", or objective element, each of those cases required specific, subjective evidence of retaliation. *See Bloch*, 156 F.3d at 681 (the release of the private details of the rape "damaged them by chilling their right to freely criticize a public official."), *Mendocino*, 156 F.3d at 1301-02 (the particular inmate's reputation and the guard's reason for punishment), *Smith*, 258 F.3d at 1177 (defendant's actions not enough to be considered retaliatory action).

As such, because no meaningful difference exists between

the circuits, Petitioners' claim that a split justifies a writ of certiorari is without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this petition for writ of certiorari be denied.

Respectfully submitted,

Larry Klayman*
Paul J. Orfanedes
James F. Peterson
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024
(202) 646-5172

Counsel for Respondents

October 21, 2002

* Denotes Counsel of Record